Menteri Sumber Manusia v John Hancock Life Insurance (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–32 OF 2003
MOKHTAR SIDIN, MOHD GHAZALI AND AUGUSTINE PAUL JJCA
7 DECEMBER 2006

Labour Law — Employment — Dismissal — Dismissal of employee holding executive position by ordinary resolution at general meeting — Whether decision of members in general meeting to remove employee in executive positions could be the subject of adjudication by Industrial Court — Whether remedy of reinstatement was incompatible with scheme set out in the Companies Act 1965 that members must be allowed to determine the affairs of company

Labour Law — Employment — Reference of dispute over dismissal to Industrial Court by Minister — Employee holding executive position removed by ordinary resolution at general meeting — Dispute whether employee was 'workman' — Whether Minister's decision to refer matter to Industrial Court was correct

Labour Law — Industrial Court — Reference by Minister — Issue whether claimant was 'workman' — Whether issue should be decided by Minister or Industrial Court — Whether reference to Industrial Court by Minister was correct

By letter dated 9 April 1997, the company offered the claimant the position of President & Chief Executive Officer ('the aforesaid positions') with a basic monthly salary of RM25,000. The claimant accepted the aforesaid offer and commenced employment with the company with effect from 1 May 1997 in the aforesaid positions. He was also appointed as director of the company on 1 May 1997. Other terms and conditions of service in relation to the aforesaid positions were contained in the company's 'Corporate Officers Service Manual' (Service Manual). However the claimant was later removed from the aforesaid positions through an ordinary resolution in an extraordinary general meeting (EGM). The claimant consequently made representations to the Director General for Industrial Relations ('the Director General') under s 20 of the Industrial Relations Act 1967 ('Act') on the basis that he considered his dismissal from the aforesaid positions to be without just cause or excuse. Upon receipt of the representations the Director General took steps to arrive at an expeditious settlement pursuant to s 20(2) of the Act. No settlement could be reached as a result of which the Director General notified the Minister. On 21 February 2002, the Minister referred the claimant's representations to the Industrial Court for an award pursuant to s 20(3) of the Act.

The company filed an application for judicial review in the High Court and for an order that all proceedings against the company in the Industrial Court be stayed pending the hearing and final determination of the proceedings. The grounds upon

which the reliefs were sought for were, inter alia; (1) the Minister acted without jurisdiction or in excess of jurisdiction in referring the dispute to the Industrial Court as the Industrial Court has no jurisdiction to adjudicate on a decision made by members in general meeting acting under s 128 of the Companies Act 1965 and the company's articles of association; furthermore, a decision made by members to remove a director/officer of a company would not in law amount to a 'dismissal' under industrial law; (2) the Minister misdirected himself in law and acted in excess of jurisdiction in deciding that the Industrial Court was the proper forum to adjudicate the matter as the Industrial Court is only vested with jurisdiction under the Act to adjudicate upon a 'dismissal' of a 'workman' whereas the claimant was not a 'workman'; and (3) the Minister erred in law and acted in excess of jurisdiction as he failed to take into consideration that due to the aforesaid positions, the claimant was as a matter of fact and law the directing mind and will of the company at all material times. The High Court allowed the company's application for certiorari and prohibition with costs on the above grounds. The learned judge also said that in bringing a claim under s 20 of the Act, a claimant must seek an order of reinstatement as otherwise he cannot maintain such an action. In relation to this, he was of the view that an order of reinstatement 'is incompatible with the scheme set out in the Companies Act 1965 that members must be allowed to determine the affairs of a officer/director' and an award of reinstatement would negate such principle. As such, he was of the view that the Industrial Court would be exceeding its jurisdiction if it is allowed to hear the claimant's representations. The Minister and the claimant appealed.

Held, allowing both appeals:

(1) The issue of whether the claimant was a workman is solely for the Industrial Court to decide and that the learned judge was wrong in issuing certiorari to quash the decision of the Minister and in issuing the order of prohibition. Where there are mixed questions of law or fact arising from representations under s 20 of the Act, the proper forum to decide on such issues would be the Industrial Court and not the Minister. Thus, the Minister's role under s 20 of the Act is to ascertain whether the representations, on the facts and material placed before him, raise serious questions of fact or of law calling for adjudication (see paras 23 & 25).

(2) The decision-making process adopted by the Minister was in accordance with s 20 of the Act, namely, upon receiving the notification of the Director General he exercised his discretion, after seeing it fit, to refer the claimant's representations to the Industrial Court for an award. There were serious and fundamental disputes of fact and questions of law that arise from the claimant's representations and these were matters which have to be dealt with by the Industrial Court. The facts placed before the Minister was adequate for him to refer the claimant's representations to the Industrial Court. It is the Industrial Court which will have to decide whether the claimant is a workman as defined under the Act (see para 34).

(3) The learned judge erred in law in holding that where there is a decision of members of a company in general meeting to remove a person from executive

positions held in a company, such decision cannot be the subject of adjudication by the Industrial Court and to do so would be to exceed its jurisdiction. It is irrelevant that the claimant was removed by way of an ordinary resolution at a general meeting wherein members of the company attended and voted. This was the procedure that the company had adopted vide its articles of association and Service Manual. The mode, method or procedure adopted by the company in removing him has nothing to do with s 20 of the Act. At the end of the day it was the company which employed him and it was the company which removed him from the aforesaid positions. The effect of members of a company casting their votes at an EGM to pass resolutions to remove an executive director and/or a corporate officer from such positions is still regarded as an act of the company. Otherwise, it would give rise to absurdity as companies will be able to terminate any of its employees through its members in general meeting knowing that the Minister cannot refer the dismissed employee's representations to the Industrial Court for an award, notwithstanding that on the face of record the dismissal was without just cause or excuse (see paras 36–37).

(4) The primary remedy under s 20 of the Act is reinstatement. The relief of reinstatement under s 20 of the Act is not in any way incompatible with the scheme of the Companies Act 1965 as ruled by the High Court. The remedy of reinstatement under s 20 of the Act does not operate as an injunction to prevent the shareholders from passing any resolution. It cannot, in any manner, fetter the rights of the shareholders to pass the resolution to remove him. It is only when the dismissal is found to be unjust that the order of reinstatement would be issued. There was no provision under the Companies Act 1965 or the Act which preclude an employee holding the position of Managing Director, Chief Executive Officer or any other executive position by whatever name called who was engaged under a contract of employment with a company from challenging his dismissal or removal by the company through the adoption of its member's resolution in general meeting (see paras 38–39).

[Bahasa Malaysia summary

Melalui surat bertarikh 9 April 1997, syarikat telah menawarkan pihak menuntut jawatan sebagai Presiden & Ketua Pegawai Eksekutif ('jawatan tersebut') dengan gaji asas bulanan sebanyak RM25,000. Pihak menuntut telah menerima jawatan tersebut dan memulakan pekerjaannya dengan syarikat yang bermula pada 1 Mei 1997. Beliau juga dilantik sebagai pengarah syarikat pada 1 Mei 1997. Terma-terma dan syarat-syarat perkhidmatan yang lain berkenaan dengan jawatan tersebut terdapat di dalam 'Manual Perkhidmatan Pegawai Korporat' ('Manual Perkhidmatan'). Walau bagaimanapun, pihak menuntut kemudiannya telah disingkir daripada jawatan tersebut melalui resolusi biasa di dalam mesyuarat agung luar biasa ('EGM'). Pihak menuntut seterusnya membuat representasi kepada Ketua Pengarah Perhubungan Perusahaan ('Ketua Pengarah') di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta') atas dasar bahawa beliau menyifatkan pemecatan beliau daripada jawatan tersebut adalah tanpa sebab dan alasan yang adil. Apabila menerima representasi, Ketua Pengarah mengambil langkah untuk sampai kepada penyelesaian yang cepat menurut s 20(2) Akta tersebut. Tiada penyelesaian dapat dicapai dan

A disebabkan itu, Ketua Pengarah memberitahu Kementerian. Pada 21 Februari 2002, Kementerian merujuk representasi pihak menuntut kepada Mahkamah Perusahaan untuk satu award menurut s 20(3) Akta tersebut.

Syarikat telah memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi dan untuk satu perintah bahawa semua prosiding terhadap syarikat
B di Mahkamah Perusahaan digantungkan sementara pendengaran dan penentuan terakhir. Alasan-alasan yang mana relief-relief yang dipohon adalah, antara lainnya; (1) Kementerian bertindak tanpa bidang kuasa atau melangkaui bidang kuasa dalam merujuk pertikaian ke Mahkamah Perusahaan yang mana Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mengadili berdasarkan keputusan yang dibuat
C oleh ahli di dalam mesyuarat agung yang diadakan di bawah s 128 Akta Syarikat 1965 dan tataurusan persatuan syarikat; seterusnya, keputusan yang dibuat oleh ahli untuk menyingkirkan seseorang pengarah/pegawai syarikat adalah bukannya dalam undang-undang yang bermaksud kepada 'pemecatan' di bawah undang-undang perusahaan; (2) Kementerian telah menyalaharahkan dirinya di dalam
D undang-undang dan bertindak melangkaui bidang kuasa dalam memutuskan bahawa Mahkamah Perusahaan adalah forum yang sesuai untuk mengadili perkara tersebut yang mana Mahkamah Perusahaan hanya berhak dengan bidang kuasa di bawah Akta tersebut apabila 'pemecatan' seorang 'pekerja' manakala pihak menuntut adalah bukannya seorang 'pekerja'; dan (3) Kementerian tersilap dalam undang-undang dan
E bertindak melangkaui bidang kuasa yang mana telah gagal mengambil kira bahawa berdasarkan kepada jawatan tersebut, pihak menuntut adalah berkenaan fakta dan undang-undang pemikiran dan kehendak langsung syarikat pada kesemua masa yang material. Mahkamah Tinggi telah membenarkan permohonan syarikat untuk certiorari dan larangan dengan kos berdasarkan alasan-alasan di atas. Hakim yang bijaksana juga menyatakan bahawa dalam membawa tuntutan di bawah s 20 Akta
F tersebut, pihak menuntut mestilah memohon satu perintah pengembalian jawatan jika tidak beliau tidak dapat mempertahankan tindakan tersebut. Berhubungan dengan ini, pandangannya bahawa perintah pengembalian jawatan 'adalah tidak bersesuaian dengan skim yang disediakan di dalam Akta Syarikat 1965 bahawa ahli hendaklah dibenarkan untuk menentukan urusan pegawai/pengarah' dan award
G pengembalian semula jawatan akan mensia-siakan prinsip tersebut. Oleh yang demikian beliau berpendapat bahawa Mahkamah Perusahaan akan melangkaui bidang kuasanya jika ia membenarkan untuk mendengar representasi pihak menuntut. Kementerian dan pihak menuntut kemudiannya merayu.

H **Diputuskan**, membenarkan kedua-dua rayuan:

(1) Isu sama ada pihak menuntut adalah pekerja adalah semata-mata untuk Mahkamah Perusahaan untuk memutuskan dan hakim yang bijaksana adalah salah dalam mengeluarkan certiorari untuk membatalkan keputusan
I Kementerian dan dalam mengeluarkan perintah larangan. Di mana terdapatnya campuran persoalan perundangan atau fakta yang timbul daripada representasi di bawah s 20 Akta tersebut, forum yang sebenar untuk memutuskan ke atas isu tersebut haruslah Mahkamah Perusahaan dan bukannya Kementerian. Oleh yang demikian, peranan Kementarian di bawah s 20 Akta tersebut adalah untuk memastikan sama ada representasi, atas fakta

dan kedudukan yang material di hadapannya, membangkitkan soalan fakta atau undang-undang yang serius yang meminta pengadilan (lihat perenggan 23 & 25).

(2) proses membuat keputusan yang diadaptasikan oleh Kementerian adalah selaras dengan s 20 Akta tersebut, iaitu apabila menerima pemberitahuan daripada Ketua Pengarah beliau menggunakan budi bicaranya, selepas melihatnya layak untuk merujuk representasi pihak menuntut kepada Mahkamah Perusahaan untuk award. Terdapatnya serius dan pertikaian asas fakta da persoalan perundangan yang timbul daripada representasi pihak menuntut dan perkara ini yang perlu diuruskan oleh Mahkamah Perusahaan. Fakta yang diletakkan di hadapan Kementerian adalah mencukupi untuknya untuk merujuk representasi pihak menuntut kepada Mahkamah Perusahaan. Adalah Mahkamah Perusahaan yang akan memutuskan bahawa sama ada pihak menuntut adalah pekerja yang ditafsirkan di bawah Akta tersebut (lihat perenggan 34).

(3) Hakim yang bijaksana tersilap dalam undang-undang dalam berpegang bahawa di mana terdapatnya satu keputusan ahli syarikat dalam mesyuarat agung untuk menyingkirkan seseorang daripada jawatan eksekutif yang di adakan di dalam syarikat, keputusan tersebut tidak boleh menjadi perkara pengadilan oleh Mahkamah Perusahaan dan melakukannya menjadikannya melangkaui bidang kuasanya. Adalah tidak relevan bahawa pihak menuntut telah disingkirkan secara resolusi biasa semasa mesyuarat agung manakala ahli syarikat telah hadir dan mengundi. Ini adalah prosedur yang mana syarikat gunakan memperlihatkan tataurusan persatuan syarikat dan manual perkhidmatan. Cara, kaedah atau prosedur yang digunakan oleh syarikat dalam menyingkirkannya adalah tiada kena-mengena dengan s 20 Akta tersebut. Akhirnya ianya adalah syarikat yang mengambilnya bekerja dan ianya adalah syarikat yang menyingkirkannya daripada jawatan tersebut. Kesan ahli syarikat membuang undi semasa EGM untuk meluluskan resolusi untuk menyingkirkan pengarah eksekutif dan/atau pegawai korporat daripada jawatan tersebut masih dianggap sebagai tindakan syarikat. Jika tidak, ianya akan memberikan tindakan yang tidak munasabah yang mana syarikat boleh menamatkan mana-mana pekerjanya melalui ahlinya di dalam mesyuarat agung, bila mengetahui Kementerian tidak boleh merujuk representasi pekerja yang dipecat kepada Mahkamah Perusahaan untuk award, walaupun di atas rekod pemecatan adalah tanpa sebab dab alasan yang adil (lihat perenggan 36–37).

(4) Remedi utama di bawah s 20 Akta tersebut adalah pengembalian semula jawatan. Relief pengembalian semula jawatan di bawah s 20 Akta tersebut adalah tidak secara mana pun tidak bersesuaian dengan skim Akta Syarikat 1965 seperti mana yang diputuskan oleh Mahkamah Tinggi. Remedi pengembalian semula jawatan s 20 Akta tersebut tidak dilakukan sebagai injunksi untuk menghalang pemegang saham daripada meluluskan apa-apa resolusi. Ianya tidak boleh dalam apa jua cara, membelenggu hak pemegang saham untuk meluluskan resolusi untuk menyingkirkannya. Ianya apabila pemecatan didapati tidak adil yang mana perintah pengembalian semula jawatan akan di keluarkan. Tiada peruntukan di bawah Akta Syarikat

atau Akta tersebut yang menghalang pekerja memegang jawatan Pengarah Urusan, Ketua Pengarah Eksekutif atau mana-mana jawatan eksekutif melalui apa jua nama yang mana terikat di bawah kontrak pekerjaan dengan sebuah syarikat daripada mencabar pemecatannya atau penyingkirannya oleh syarikat melalui penggunaan resolusi ahlinya di dalam mesyuarat agung (lihat perenggan 38–39).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.
For cases on Industrial Court, reference by Minister, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1540–1546.

Cases referred to

Chief Constable of the North Wales Police v Evans [1982] 3 All ER; [1982] 1 WLR 1155 (refd)
Chong Kim Sang v Metratrade Sdn Bhd [2004] 3 MLJ 1 (refd)
Dr A Dutt v Assunta [1981] 1 MLJ 304 (refd)
Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chan [1996] 1 MLJ 481 (refd)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (refd)
Minister of Labour Malaysia v National Union of Journalists Malaysia [1991] 1 MLJ 25 (refd)

Legislation referred to

Companies Act 1965, ss 128(2), (3), 145
Industrial Relations Act 1967, ss 2, 20(2), (3)

Alice Loke Senior Federal Counsel (Attorney Geneneral in Chamber) for the appellant (first appeal).
N Sivabalah (Raymond TC Low with him) (Shearn Delamore & Co) for the appellant (second appeal).
R Abraham (Mazura Kamaludin with him) (Shook Lin & Bok) for the respondent (both appeals).

Mohd Ghazali JCA (delivering judgment of the court):

[1] These two appeals which were heard together stem from the decision of Faiza Tamby Chik J who allowed the application of John Hancock Life Insurance (Malaysia) Berhad (the applicant and hereinafter referred to as 'the company') against the Minister of Human Resources, Malaysia (the first respondent and hereinafter referred to as 'the Minister'), Ng Kim Hoong (the second respondent and hereinafter referred to as 'the claimant') and the Industrial Court (the third respondent and hereinafter referred to as 'the Industrial Court') for the following reliefs:

(i) an order of certiorari to quash the decision of the Minister for referring representations made by the claimant under s 20 of the Industrial Relations Act 1967 ('Act') to the Industrial Court for adjudication; and

(ii) an order of prohibition to prevent the Industrial Court from hearing the claimant's representations under s 20 of the Act. A

The Minister and the claimant are the respective appellants in these appeals.

THE BACKGROUND

B

[2] By letter dated 9 April 1997, the company offered the claimant the position of President & Chief Executive Officer (hereinafter referred to as 'the aforesaid positions') with a basic monthly salary of RM25,000; the letter reads:

C

Dear Mr. Ng,

Here are the key points of our offer to you concerning the position of President & Chief Executive Officer of John Hancock Life Insurance (Malaysia) Berhad, referred to hereafter as the company.

1. You will receive *a basic monthly salary of RM25,000.* D

2. You will be eligible to participate in the company's Incentive Compensation Plan. Awards under this plan are related to the company's performance relative to the annual goals approved by the Board of Directors. Your target award will be four times your basic monthly salary. The actual award for 1997, distributed in May 1998, will be based on RM100,000 pro-rated for the number of months of service in 1997. E

3. The company will provide group life, and retirement benefits in accordance with the rules and regulations of the schemes that are in place. You and your family will be covered for the medical benefits of the company. Any change in employee benefit schemes shall be decided by the Board of Directors.

F

4. You will be entitled to a fully-maintained company car with a driver. The car will be a Mercedes E230. The car will be replaced every five years. Any change in make and model of the company car shall be decided by the Board of Directors.

5. The company will provide a golf club membership for you and your family at KL Golf & Country Club and pay for the monthly subscriptions of two other clubs, ie Royal Selangor Golf Club and Bukit Kiara Equestrian Club. If, for any reason, your employment with the company is terminated before five years (60 months) from the effective date of employment, you are required to pay back to the company the outstanding balance of the amortized cost of the golf membership over the five year period. G

H

6. There will be a period of up to six months before your appointment is confirmed by the Board of Directors. During this period, your employment may be terminated without cause by either party upon two weeks notice.

7. *After your confirmation by the Board of Directors,* you will be entitled to 22 working days of annual leave per year. I

This letter is intended to reflect the oral agreement achieved through Mr CF Lee of Wendy Lau Associates Sdn Bhd. Should you find it to be acceptable as is, please indicate your acceptance of this offer and confirm your intention to join John Hancock Life Insurance (Malaysia) Berhad.

I hope we may look forward to welcoming you to this *key senior executive appointment* in the John Hancock family of companies.

Yours sincerely

(Sign)

Derek Chilvers

Chairman of the Personnel Committee

John Hancock Life Insurance (Malaysia) Berhad

Accepted and Confirmed:

(Sign)

John Ng Kim Hong.

[Emphasis is ours]

[3] The claimant accepted the aforesaid offer and commenced employment with the company with effect from 1 May 1997 in the aforesaid positions. He was also appointed director of the company on 1 May 1997. The claimant's employment with the company was subjected to a probationary period of approximately six months. His appointment in the aforesaid positions was also contingent upon the approval of Bank Negara Malaysia, which was given on 15 August 1997. In relation to this, the extract of minutes of the company's Board of Directors' meeting ('Board') held on 30 April 1997 reads:

2. Appointment of CEO

On recommendation from the Personnel Committee, the Board approved the appointment of Mr John Ng Kim Hoong as *Acting President and Chief Executive Officer as well as Managing Director* of the company with effect from 1 May 1997. His appointment is in an acting capacity until such time as approved by Bank Negara. Mr Ng's appointment is therefore subject to Bank Negara's approval and the terms and conditions as stipulated in the company's letter of offer to him dated 9 April 1997.

(Emphasis added.)

[4] The company later confirmed the claimant's employment in the aforesaid positions at the conclusion of his probationary period. Other terms and conditions of service in relation to the aforesaid positions are contained in the company's 'Corporate Officers Service Manual' ('Service Manual'). The preamble to the Service Manual, inter alia, reads

The terms and conditions of employment and prerequisites provided as set forth in this Service Manual *shall be applicable to all Executive Directors and confirmed Malaysian*

employees of John Hancock Life Insurance (Malaysia) Berhad holding the rank of Assistant Vice President and above" (hereinafter termed 'Corporate Officers' or 'Officers'). They shall not apply to non-Executive Directors of the company.

(Emphasis added.)

[5] However at a meeting of the Board on 17 November 2000, the Board resolved to requisition for an extraordinary general meeting (EGM) to pass the following ordinary resolutions, namely:

(i) That Mr John Ng Kim Hoong be and is hereby *removed as Director and Managing Director* of the company with immediate effect; and

(ii) That Mr John Ng Kim Hoong be and is hereby *removed as President and Chief Executive Officer* of the company with immediate effect.

(Emphasis added.)

[6] Special notice was given to members of the company, the Kuala Lumpur Stock Exchange and the claimant (pursuant to s 128(2) of the Companies Act, 1965) in respect of the resolutions. In response the claimant made written representations to the company pursuant to s 128(3) of the Companies Act 1965.

[7] In the company's circular to its members in relation to the proposed removal as well as notice of the EGM, the reasons for the proposed removal included the following:

(e) *As Managing Director, President and Chief Executive Officer* of the company, Mr John Ng Kim Hoong was entrusted with the execution and implementation of the Yearly Business Plans and is accountable for ensuring that the targets set out in the said Plans were met and the objectives of the company realised.

(f) The continuous deterioration of the company's position in terms of market share, and failure to meet Yearly Business Plan Targets in other key aspects of life insurance business as mentioned above, have caused the Board of Directors to lose confidence in the ability of Mr John Ng Kim Hoong to effectively discharge his duties and functions *as Managing Director, President and Chief Executive Officer* of the company and his related position on the Board. The Board therefore has found it necessary to take the present course of action in the best interests of the company.

(Emphasis added.)

[8] The EGM of the company was held on 5 January 2001 wherein the following resolutions were passed by a majority of the total votes cast, namely:

(i) that the claimant be and is hereby removed as Director and Managing Director with immediate effect; and

(ii) that the claimant be and is hereby removed as President and CEO with immediate effect.

[9] By letter addressed to the claimant dated 9 January 2001, the company confirmed the aforesaid resolutions and terminated his services with effect from 5 January 2001. That letter, inter alia, reads:

> Dear Mr Ng,
>
> Re: Letter of Appointment dated April 9,1997
>
> Removal as President and Chief Executive Officer of the Company
>
> We refer to the Extraordinary General Meeting of the company held on January 5, 2001 and the ResoIution passed removing you as *President and Chief Executive Officer* of the company.
>
> Please be informed that your services as *President and Chief Executive Officer* of the company are accordingly terminated with effect from 5 January 2001.
>
> The company will pay you *two months' salary* in lieu of notice less the sum of RM41,008 being reimbursement due to the company in respect of the unvested (sic) portion of club membership fees paid by the company.
>
> Please be informed that the above payment *(which will be released upon receipt of clearance from the Inland Revenue Department)* is made without prejudice and subject to all and such other claims the company has or may have against you.
>
> (Emphasis added.)

THE REPRESENTATIONS

[10] The claimant consequently made representations to the Director General for Industrial Relations ('Director General') under s 20 of the Act on the basis that he considered his dismissal from the aforesaid positions to be without just cause or excuse. Upon receipt of the representations the Director General took steps to arrive at an expeditious settlement pursuant to s 20(2) of the Act; at that stage, the company raised the two following issues:

(i) whether the claimant can properly be classified as a 'workman' within the meaning of s 20 of the Act;

(ii) whether the claimant, having been removed by way of two resolutions passed at an EGM of the company, can challenge such removal by way of reference under s 20 of the Act.

[11] No settlement could be reached as a result of which the Director General notified the Minister. On 21 February 2002, the Minister decided to refer the claimant's representations to the Industrial Court for an award pursuant to s 20(3) of the Act.

THE APPLICATION

[12] On or about 4 April 2002, the company filed a leave application for judicial review in the Kuala Lumpur High Court and for an order that all proceedings against

the company in the Industrial Court be stayed pending the hearing and final determination of these proceedings for leave and the application for the substantive reliefs thereto.

[13] The grounds upon which the reliefs were sought for can be summarised as

(a) the Minister acted without jurisdiction or in excess of jurisdiction in referring the dispute to the Industrial Court as the Industrial Court has no jurisdiction to adjudicate on a decision made by members in general meeting acting under s 128 of the Companies Act 1965 and the company's articles of association; furthermore, a decision made by members to remove a director/officer of a company would not in law amount to a 'dismissal' under industrial law;

(b) the Minister misdirected himself in law and acted in excess of jurisdiction in deciding that the Industrial Court was the proper forum to adjudicate the matter as the Industrial Court is only vested with jurisdiction under the Act to adjudicate upon a 'dismissal' of a 'workman' whereas the claimant was not a 'workman';

(c) the Minister erred in law and in jurisdiction as the Industrial Court is not empowered to adjudicate on the claimant's removal from the aforesaid positions by members of the company;

(d) the Minister erred in law and exceeded his jurisdiction when he failed to appreciate that if the Industrial Court were to adjudicate upon the matter the Industrial Court would be acting contrary to law, to wit, s 128 of the Companies Act 1965;

(e) the Minister erred in law and acted in excess of jurisdiction as he failed to take into consideration that due to the aforesaid positions, the claimant was as a matter of fact and law the directing mind and will of the company at all material times.

[14] Leave was granted on 3 May 2002 by the High Court. On 23 April 2003 the High Court allowed the company's application for certiorari and prohibition with costs on the following grounds:

(i) that the Minister erred in law in failing to deal with the threshold jurisdictional issue as to whether the claimant was a workman under the Act;

(ii) that the Minister had erred in law in failing to appreciate that the removal of the claimant in the aforesaid positions cannot be subjected to adjudication by the Industrial Court and outside the purview of s 20 of the Act;

(iii) that the Minister had failed to direct himself in law and if he had done so, he would come to the conclusion that the claimant was not a 'workman' under the Act.

Against the above decision, the Minister and the claimant appealed.

[15] In his grounds of decision, the learned judge said that any challenge to the threshold jurisdiction of the Industrial Court must be taken by way of challenge to the decision of the Minister's act in referring the dispute to the Industrial Court and

not otherwise and this was categorically set out by the Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 at p 699 (per Gopal Sri Ram JCA):

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg. whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

[16] From our reading of the arguments raised before the learned judge in the instant appeal, we do not think that the step taken by the company in pursuing this application was seriously disputed by the Minister and the claimant as being procedurally defective or wrong in law. The challenge embarked upon by the company in this application was proper. What Gopal Sri Ram JCA stressed upon in *Kathiravelu Ganesan* was that such challenges as to whether, inter alia, a claimant is or is not a workman should not be taken or dealt with as a preliminary objection in the Industrial Court. This was exactly the scenario in *Chong Kim Sang v Metratrade Sdn Bhd* [2004] 3 MLJ 1. In that case, the challenge taken by the respondent there, namely, that the claimant was not a workman was taken up on a preliminary objection before the Industrial Court which naturally resulted in a delay in adjudicating the trade dispute. The Industrial Court, on the preliminary objection, held that the claimant, who was the respondent's general manager and executive director at the material time, was not a workman within s 2 of the Act and as such the Industrial Court did not have jurisdiction to determine the reference made to it by the Minister. The claimant moved the High Court for an order of certiorari to quash the award of the Industrial Court and for an order of *mandamus* to direct the Industrial Court to hear his dismissal on the merits. The High Court dismissed the application. This court allowed the appeal by the claimant and issued *mandamus* directing the Industrial Court to adjudicate the claimant's dismissal case on the merits.

[17] Further in his grounds of decision in the instant appeal, the learned judge, after citing *Minister of Labour Malaysia v National Union of Journalists Malaysia* [1991] 1 MLJ 25 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chan* [1996] 1 MLJ 481 said that the Minister's discretion under s 20 of the Act is not unfettered and is liable to be quashed by the court if the Minister exceeds his jurisdiction and that if the applicant can establish either:

(a) there was an outright refusal by the Minister to consider a relevant matter;

(b) a misdirection by the Minister on a point of law;

(c) the Minister took into account a wholly irrelevant or extraneous consideration; or

(d) the Minister omitted to take into account a relevant consideration;

his decision to refer the representation to the Industrial Court is liable to be quashed by the court.

[18] Again, we do not think that the position of the law as summarised above by the learned judge was seriously disputed in these proceedings. What we are concerned with would be whether the decision of the learned judge was correct in law under the circumstances pertaining to this application and we will now deal with it.

[19] In his grounds of decision in relation to the threshold jurisdiction of the Industrial Court the learned judge said as follows:

> The first respondent Minister, in his affidavit in reply of 18 October 2002, set out the basis and ground on which he decided to refer the representation to the Industrial Court. I think it is clear from the first respondent Minister's affidavit that the first respondent had completely omitted to deal with and decide on the specific threshold jurisdiction issue posed, ie whether the second respondent, having been removed by way of two (2) resolutions, passed at the Extraordinary General Meeting of the Applicant, can challenge the removals by way of reference under s 20 of the said Act. This issue was specifically raised in the applicant's written representation at the conciliation proceedings. The failure by the first respondent Minister to consider and determine the said issue, in any manner, is, with respect, a clear error of jurisdiction on the first respondent Minister's part which, in itself, necessitates intervention by this court.
>
> Had the first respondent Minister properly directed himself to the issue, he would have concluded that the Industrial Court would have no jurisdiction to determine a removal by way of vote of shareholders for the following reasons:
>
> (i) I am of the opinion that where there is a decision of shareholders to remove a person from positions held in a company, such decision cannot be the subject of adjudication by the Industrial Court and to do so would be to exceed its jurisdiction;
>
> (ii) On a consideration of the court to consider the relevant facts set out in the applicant's affidavit which set out the background of the removal of the second respondent by shareholders of the applicant at paras 17 and 18;
>
> (iii) This case presents a novel and unusual situation where the position of the second respondent in the applicant was determined by way of a vote of shareholders taken at an Extraordinary General Meeting of the applicant. It is I think, the first time a removal of a director/executive by shareholders at a general meeting is being challenged by way of a s 20 reference under the said Act.

[20] Within the same context, in relation to s 20 of the Act, the learned judge said:

> This section does not, on its express terms, entitle the Industrial Court to enquire into and adjudicate upon what is essentially an issue of company law, ie, the rights of shareholders to remove a director and/or officer of a company and enquire into the basis or otherwise of such decision taken at such meeting of shareholders of a company. Such a removal by shareholders taken by way of resolution of a general meeting of a company cannot amount to a 'dismissal' within the meaning of s 20 of the said Act.

[21] The learned judge's reasons as to why he allowed the company's application can be summarised as follows:

(i) the removal of the claimant from his respective positions was by members exercising their right to vote at an EGM and in law, the members are under no duty to furnish a reason for voting for or against a particular resolution tabled at a general meeting;

(ii) under s 20 of the Act, the Industrial Court can only adjudicate on a dismissal between a 'workman' and an 'employer'; if the employer of the claimant is to be taken as the company, on the assumption that the claimant is a workman and which is not the case, then the removal, having been determined by the members who are, in law, separate and distinct from the company, cannot be the subject of adjudication by the Industrial Court as they are not parties to whom the Industrial Court may exercise jurisdiction over; the Industrial Court would accordingly be acting in excess of its jurisdiction in seeking to enquire whether a dismissal is without just cause or excuse if it proceeds to adjudicate on the basis on which the members exercised their vote on a particular resolution when such members are not required, in law, to give reasons;

(iii) it is well established that in bringing a claim under s 20 of the Act a claimant must seek an order of reinstatement as otherwise he cannot maintain such an action; in relation to this, the learned judge said:

> I think that an order of reinstatement (which is in the nature of a statutory injunction), is incompatible with the scheme set out in the Companies Act 1965 that shareholders must be allowed to determine the affairs of a company including any question on the removal of a officer/director. Any award of reinstatement would, negate such principle which is well established in company law and compel the shareholders, against the wishes expressed by way of a vote at a general meeting to re-engage an officer/director they have deemed should be removed. In the circumstances, I am of the view that the Industrial Court would be exceeding its jurisdiction if it is allowed to hear the reference.

(iv) the Minister misdirected himself in law when he stated in his affidavit that the issue of the workman can only be determined by the Industrial Court and that the issue as to whether the claimant is a workman is a mixed question of law and fact which can only be determined by the Industrial Court; the learned judge was of the view that if the Minister had properly directed himself in law, he would come to the conclusion that the claimant was not a 'workman' under the Act; with regards to this, the learned judge also said as follows:

> What is clear is that the second respondent had full control and power to run the applicant organisation on a day to day basis and was fundamental in formulating role and implementing policies of the applicant. Further, the second respondent, by virtue of his top level management positions in the applicant, represented the 'directing mind and will of the applicant', both in the formulation, implementation and execution of the applicant's policies and was also fully empowered and authorised to run the applicant on a day to day basis in all key areas of administration, operations, sales, information technology and finance subject to his reporting to the Board of Directors of the applicant on a limited basis. He was, therefore, at the very apex of the applicant's management.

> The Supreme Court in *Inchape Malaysia Holdings Bhd. v. RB Gray & Anor* [1985] 2 MLJ 297 decided that a director of the company who is regarded as representing the directing mind and will of the company is not a 'workman' under the Act. On this basis, and without more, I think the second respondent who was a director of the Applicant, cannot be regarded as a 'workman' for the purposes of the said Act. In the instant case, the second respondent, apart from being a director on the Board of the Applicant, held the top executive/management position in the applicant company, and hence, cannot be considered, in law a 'workman'. His position placed the second respondent in a position of authority in the corporation that employed him, a factor recognised in *Hoh Kiang Ngan* as a material consideration in determining who is a 'workman'. In this regard, in the context of company directors and those holding executive positions, the test in *Inchape v Gray* continues to apply although the decision itself in Inchape was formally overruled in *Kathiravelu Ganesan*;
>
> In the instant case, unlike Inchape, the second respondent's various designations placed him in a position of clear authority in the corporation that employed him ie, the applicant. Therefore I am of the opinion that whether the 'control' test or the 'directing will and mind of the company' test is applied, it is clear that the second respondent was not a 'workman' within the meaning of the said Act;
>
> (*Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369)

(v) the Minister must decide the threshold jurisdiction question posed and not relinquish that duty by seeking to refer the matter to the Industrial Court.

In conclusion, the learned judge said:

> In summary, I would state that the first respondent Minister has a duty, in law, to consider and decide all questions pertaining to the threshold jurisdiction of the Industrial Court. When such questions of threshold jurisdiction are raised by a party under s 20 of the said Act, the first respondent Minister must specifically address and decide the questions and such decision must be correct in law. In the instant case, the first respondent Minister failed to decide the specific question of threshold jurisdiction posed to him and further misdirected himself, in law, of the threshold jurisdiction posed and took into account irrelevant matters in making his decision. For these reasons I grant order in terms of (1), (2) and cost of the application.

[22] We had allowed both these appeals with costs here and below and our reasons for doing so are as follows.

[23] We are of the view that the issue of whether the claimant is a workman is solely for the Industrial Court to decide and that the learned judge was wrong in issuing certiorari to quash the decision of the Minister and in issuing the order of prohibition. We would agree with the submission of learned counsel for the claimant that the law is clear, namely, that where there are mixed questions of law or fact arising from representations under s 20 of the Act, the proper forum to decide on such issues would be the Industrial Court and not the Minister. *In Dr A Dutt v Assunta* [1981] 1 MLJ 304 which was referred to by learned counsel for the claimant, Chang Min Tat FJ in delivering the decision of the Federal Court said (at p 310):

A As for the determination whether Dr Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta Hospital v Dr A Dutt* said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question.

B **[24]** In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*, this court said that 'when a question arises as to whether the Minister has correctly exercised his discretion under s 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister'. After dealing with several authorities, this court held (at p 519) as follows:

C It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s 20(1) of the Act and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether, on the fact and materials placed before him, the representations raise serious questions of fact or of law calling for adjudication.

D **[25]** Thus, the Minister's role under s 20 of the Act is to ascertain whether the representations, on the facts and material placed before him, raise serious questions of fact or of law calling for adjudication. The learned judge in this instant appeal was however of the view that the Minister took into account irrelevant matters in making his decision to refer the claimant's representations to the Industrial Court for an award. He was also of the view that if the Minister had properly directed himself in law, he would come to the conclusion that the claimant was not a workman. He consequently held that the claimant was not a workman within the meaning of the Act. This question, as we have mentioned earlier, is solely a question for the Industrial Court to decide. A workman, under the Act, is defined in s 2 as follows:

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F 'workman' means any person, including an apprentice, *employed by an employer under a contract of employment* to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

G (Emphasis added.)

[26] A 'contract of employment' is defined in s 2 of the Act as follows:

H 'contract of employment' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman;

I **[27]** The facts showed that by letter dated 9 April 1997, the company offered the claimant the aforesaid positions with a monthly basic salary of RM25,000. Other forms of remuneration were also offered to him. He commenced employment with the company with effect from 1 May 1997. He was put on probation and was later confirmed in the aforesaid positions. He was also appointed director on 1 May 1997. Other terms and conditions of his employment are set out in the Service Manual. The preamble to the Service Manual shows that the terms and conditions

therein are applicable to all 'Executive Directors' and 'confirmed Malaysian employees' of the company holding the rank of Assistant Vice President and above which in the manual are termed 'Corporate Officers' or 'Officers', but does not apply to 'non-Executive Directors'. The Service Manual would clearly apply to the claimant. The articles contained therein are comprehensive enough and amongst the articles are the following:

(a) A Corporate Officer who has successfully completed his probationary period shall be informed in writing that he has been confirmed in his regular employment with the company (art 2(c));

(b) After confirmation employment may be terminated by either party giving to the other party two months' notice or salary in lieu of notice (art 3)

(c) Hours of work (art 4);

(d) Transfers of Corporate Officers in the course of its operations (art 5);

(e) Annual leave (art 7) and sick leave (art 11);

(f) Mileage claims (art 19), travelling allowances (art 20), outstation accommodation (art 21) and air travel (art 22);

(g) Employee group insurance scheme (art 29);

(h) Retirement on attaining the age of 55 (art 33).

[28] Upon perusing the company's articles of association we also noted the following art:

Article 77.

(A) *The remuneration of the Directors, who hold no executive office with the company, for their services as Directors shall be determined by the company by ordinary resolution at a general meeting* and thereafter shall not be increased except by an ordinary resolution of the company passed an annual or other general meeting of the company where notice of the proposed increase has been given in the notice convening the meeting.

(B) *Executive Directors of the company shall be remunerated in the manner as may from time to time be determined by the Directors* but such remuneration shall not include a commission on or percentage of turnover. Fees payable to the executive Directors shall not be increased except pursuant to a resolution passed at a General Meeting where notice of the proposed increase has been given in the notice convening the meeting.

(Emphasis added.)

[29] Articles 91 to 93 which deal with 'Officers' and art 94 which refers to an 'Executive Committee' read as follows:

OFFICERS

91. (1) *The Directors may appoint Officers of the Company*. The Officers may consist of a Chairman of the Board of Directors, several *Executive Directors*, a *President* and a Secretary

or any of the aforesaid offices and such other Officers as the Directors may determine. The Directors shall have power from time to time to appoint an Officer or Officers to fill an office becoming vacant or to appoint an Officer to an additional or a new office. None of the Officers need be a member. Any person may hold more than one such office except that the Secretary shall not be a director or vice versa.

(2) *The Executive Directors may be designated as Managing Director, Finance Director and any other designations as the Directors may decide*. The Managing Director so appointed shall not while holding that office, be subject to retirement by rotation and he shall not be taken into account in determining the rotation or retirement of Directors or the number of Directors to retire, but shall otherwise be subject to the same provisions as to resignation and removal as the other Directors of the Company.

(3) The functions of Managing Director, President and Finance Director shall be as follows:

(a) *The Managing Director (or a person holding a similar office called by any other title the Directors may decide) shall be the Chief Executive Officer of the Company and shall subject to any directions from the Board of Directors have direct supervision of the affairs of the company and of the day to day running of the company.* The Managing Director shall be the Principal Officer under the Malaysian Insurance Act 1963.

(b) The President shall be the Chief Operating Officer of the company

(c) The Finance Director shall be the Chief Financial Officer and Treasurer of the company.

92. The company in general meeting may at any time remove an Officer from office. Unless the company shall resolve that a vacated office be suspended or abolished the Directors may fill the same at any time.

93. The Officers shall perform such duties as may from time to time be prescribed by the Directors, subject to the provisions of these presents.

EXECUTIVE COMMITTEE

94. (1)The Directors may appoint the Executive Directors and certain Non-Executive Directors to an Executive Committee which shall consist of not more than seven members.

(2) *Subject to the express directions of the Board of directors and to any directions which may be given by the company in general meeting, the Executive Committee shall manage the business of the company*, and shall be empowered to do on behalf of the company any act which the Directors may do, except make call, forfeit shares, borrow money, or fill a casual vacancy on the Board.

(Emphasis added.)

[30] The above facts and material would have been made available to the Director General and consequently the Minister. A perusal of the company's articles of association referred to above would show that there is a difference between non-executive directors and executive directors in relation to functions, designation, remuneration, powers and retirement; it can be illustrated as follows:

(i) remuneration of directors who hold no executive function shall be determined by the company by ordinary resolution in general meeting;

(ii) executive directors shall be remunerated in the manner as may from time to time be determined by the directors but fees payable to executive directors shall not be increased except pursuant to a resolution passed in general meeting;

(iii) the Board may appoint 'officers' of the company which may consist of, inter alia, executive directors and a President;

(iv) executive directors may be designated managing director, finance directors and any other designation as the directors may decide;

(v) the managing director so appointed shall not while holding that office be subject to retirement by rotation (as opposed to a director);

(vi) the functions of the managing director, president and finance director shall be:

(a) the managing director shall be the chief executive officer;

(b) the president shall be the chief operating officer;

(vii) the directors may appoint an executive director to the Executive Committee;

(viii) the Executive Committee, subject to the express directions of the Board and any directions given by the company in general meeting, shall manage the business of the company.

[31] The company's letter informing the claimant of his appointment to the aforesaid positions read together with the Service Manual and the company's articles of association would denote the existence of a contract of employment between the company and the claimant. It would also denote that the claimant will be wearing two hats, viz, as 'Corporate Officer' or 'Officer' he is an employee and as executive director he is a member of the Board.

[32] The Executive Committee of which the claimant is a member is the body that shall manage the business of the company, subject to the express directions of the Board and any directions given by the company in general meeting. Under the provisions of the Companies Act 1965 and the company's articles of association, members of the company entitled to attend a general meeting of the company may vote on any resolution proposed. The company in general meeting may at any time remove an officer from office. Thus, the claimant can be dismissed by the company in general meeting.

[33] The learned judge however has decided that the claimant is not a workman as defined under s 2 of the Act. The material before us highlighted earlier seems to suggest otherwise. The Industrial Court has yet to adjudicate upon the claimant's representations and it is now prohibited from doing so. The learned judge has issued certiorari to quash the decision of the Minister on the grounds that he failed to decide the specific question of threshold jurisdiction and further misdirected himself, in law, of the threshold jurisdiction posed and took into account irrelevant matters in making his decision. We cannot fathom this. We are of the view that based upon the facts and material before the Minister, he correctly exercised his discretion under s 20(3) of the Act in referring the claimant's representations to the Industrial Court for an award.

[34] We would agree with learned counsel for the claimant that where there is an issue of workman involved, the only legal forum to deal with this issue is the Industrial Court. A certiorari is given only in cases where an error of law is disclosed. We cannot see any error of law disclosed in the Minister's decision to refer the claimant's representations to the Industrial Court. 'Judicial review is concerned, not with the decision, but with the decision-making process' and so say Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER; [1982] 1 WLR 1155 at p 1173. The decision-making process adopted by the Minister was in accordance with s 20 of the Act, namely, upon receiving the notification of the Director General he exercised his discretion, after seeing it fit, to refer the claimant's representations to the Industrial Court for an award. We cannot find anything wrong with the Minister's decision in doing so. There are serious and fundamental disputes of fact and questions of law that arise from the claimant's representations and these are matters which have to be dealt with by the Industrial Court. The facts placed before the Minister were adequate for him to refer the claimant's representations to the Industrial Court. It is the Industrial Court which will have to decide whether the claimant is a workman as defined under the Act. Once the Industrial Court determine the claimant was a workman, it has the jurisdiction.

[35] We are of the view that the learned judge erred in law in holding that the claimant was not a workman as that would be tantamount to usurping the power of the Industrial Court. We noted that his decision was based on his perception that the claimant was the 'apex' of the company's management and also the observations of the Supreme Court in *Inchcape.* The learned judge seems to have overlooked the decision of the Federal Court in *Hoh Kiang Ngan* wherein the Federal Court was of the view that observations made by the Supreme Court in *Inchcape* concerning the claimant's role as the brain or directing mind and will of the company must be read as being confined to the peculiar facts of that case and not as laying down any universal test. Furthermore, *Inchcape* was consequently overruled by the Federal Court in *Kathiravelu Ganesan.*

[36] In the instant appeal, we are also of the view that the learned judge erred in law in holding that where there is a decision of members of a company in general meeting to remove a person from executive positions held in a company, such decision cannot be the subject of adjudication by the Industrial Court and to do so would be to exceed its jurisdiction. We cannot fathom this. It was the company which employed the claimant to the aforesaid positions and it was the company which removed the claimant from the aforesaid positions. As discussed earlier, the company may, according to the Service Manual, terminate the claimant's employment as 'Corporate Officer' or 'Officer' by giving him two months' notice or two months salary in lieu of notice. The company may also by ordinary resolution in general meeting remove an 'Officer' from office and hence a general meeting has to be called to pass such resolutions. Section 145 of the Companies Act 1965 provides that notice of a general meeting shall be served on every member having a right to attend and vote thereat. The company has to remove the claimant from the aforesaid positions and also as executive director by way of ordinary resolutions passed in an EGM, viz, a general meeting. The members present at the EGM by majority voted in favour of the resolutions. The company henceforth issued the

dismissal letter. We are of the view that it is irrelevant that the claimant was removed by way of an ordinary resolution at a general meeting wherein members of the company attended and voted. This was the procedure that the company adopted vide its articles of association and Service Manual. Furthermore, the claimant as an executive director has to be removed by way of ordinary resolution in general meeting.

[37] Thus, we are of the view that the learned judge made an erroneous finding of law when he ruled that the removal of the claimant by way of general meeting cannot be the subject of adjudication by the Industrial Court. The claimant considered he has been dismissed without just cause or excuse by the company. The mode, method or procedure adopted by the company in removing him has nothing to do with s 20 of the Act. At the end of the day it was the company which employed him and it was the company which removed him from the aforesaid positions. The effect of members of a company casting their votes at an EGM to pass resolutions to remove an executive director and/or a corporate officer from such positions is still regarded as an act of the company. As such, we cannot fathom the decision of the learned judge that such a dismissal in general meeting cannot be subject to adjudication by the Industrial Court. This is a wrong perception of the law and gives rise to absurdity as companies will be able to terminate any of its employees through its members in general meeting knowing that the Minister cannot refer the dismissed employee's representations to the Industrial Court for an award, notwithstanding that on the face of record the dismissal was without just cause or excuse.

[38] Further in his grounds of decision, the learned judge also said that it is well established that in bringing a claim under s 20 of the Act, a claimant must seek an order of reinstatement as otherwise he cannot maintain such an action. In relation to this, he was of the view that an order of reinstatement 'is incompatible with the scheme set out in the Companies Act, 1965 that members must be allowed to determine the affairs of a officer/director' and an award of reinstatement would negate such principle. As such, he was of the view that the Industrial Court would be exceeding its jurisdiction if it is allowed to hear the claimant's representations. With respect to the learned judge, we cannot agree. In relation to this we would align ourselves with the submission of learned counsel for the claimant which is as follows:

> The primary remedy under s 20 of the Industrial Relations Act 1967 is reinstatement. The relief of reinstatement under s 20 of the Act is not in any way incompatible with the scheme of the Companies Act 1965 as ruled by the High Court. The remedy of reinstatement under s 20 of the Act does not operate as an injunction to prevent the shareholders from passing any resolution. It cannot, in any manner, fetter the rights of the shareholders to pass the resolution to remove him. It is only when the dismissal of the Appellant is found to be unjust that the order of reinstatement would be issued.

[39] We would hold that the Minister's act in referring the claimant's representations under s 20 of the Act to the Industrial Court for an award was a correct exercise of discretion under the circumstances of this instant appeal. The company's averment that the Minister erred in law and has acted without jurisdiction or in excess of jurisdiction and has taken into account irrelevant matters bear no merits. We cannot find any provision under the Companies Act, 1965 or the

A Act which preclude an employee holding the position of Managing Director, Chief Executive Officer or any other executive position by whatever name called who was engaged under a contract of employment with a company from challenging his dismissal or removal by the company through the adoption of its member's resolution in general meeting.

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[40] For the reasons aforesaid, we allowed both appeals with costs here and below and set aside all orders made by the learned judge and reinstate the Minister's decision to refer the claimant's representations to the Industrial Court for an award. The deposit is to be refunded to the appellants.

C *Appeals allowed with costs.*

Reported by Loo Lai Mee

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